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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANK THOMAS LOPEZ, Defendant and Appellant.	E033787 (Super.Ct.No. RIF104563) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, Melissa A. Mandel and Erika Hiramatsu, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, III, IV, V.B, V.C, and V.E.

Defendant invited neighborhood boys over to his house, then played a pornographic video for them. While one of the boys was lying prone, watching the video, defendant grabbed him by the waist and "pump[ed] him" up and down, to show him "how it's going to feel when you're with a girl" -- i.e., to simulate sex. He then did the same thing to a second boy.

As a result, a jury found defendant guilty on two counts of a nonforcible lewd and lascivious act on a child under 14 (Pen. Code, § 288, subd. (a)), two counts of annoying or molesting a child (Pen. Code, § 647.6, subd. (c)(2)), and one count of using pornography to seduce a minor (Pen. Code, § 288.2, subd. (a)). Defendant admitted a multiple-victim special circumstance for purposes of the one strike law (Pen. Code, § 667.61). Defendant also admitted a prior sexual offense, for purposes of the habitual sexual offender law (Pen. Code, § 667.71), the three strikes law (Pen. Code, §§ 667, subd. (b)-(i), 1170.12), and a prior serious felony enhancement (Pen. Code, § 667, subd. (a)). Defendant was sentenced to 61 years to life in prison.

Defendant contends that the trial court, after sentencing him under the habitual sexual offender law, had to strike or dismiss the finding under the one strike law. He cites *People v. Snow* (2003) 105 Cal.App.4th 271, which does indeed support this contention. In the published portion of this opinion, however, we will respectfully decline to follow *Snow*. We will hold that the one strike law finding must stand, for two reasons: first, it is not inconsistent with sentencing under the habitual sexual offender

law; and second, in the event the habitual sexual offender law finding is ever invalidated on appeal or habeas corpus, it facilitates sentencing defendant under the one strike law.

In the unpublished portion of this opinion, we find no other prejudicial error. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

Defendant lived with his disabled mother. Though usually called "Boomer," defendant was also known as "Candyman" because he handed out candy to children.

On June 22, 2002, defendant asked Benny M., aged 11, to bring some friends over to his house; he said he would buy them pizza and soda if they mowed his lawn. Around 2:00 p.m., Benny arrived, bringing with him his friends Chris G., aged 9, and Chris's brother Louie G., aged 13.

The boys went into defendant's room. The furnishings included "a bed on the floor" (also described as a mattress), a TV, a VCR and a telescope. Defendant played a pornographic video. It depicted heterosexual intercourse and oral copulation as well as gay and lesbian sex acts. Defendant also showed the boys pictures of naked women that had been torn out of an adult magazine.

Three other boys arrived. According to Louie, defendant told them he had "sucked our dicks."

At one point, when Benny and Chris were lying on their stomachs on the bed, watching the video, defendant first straddled Benny, then lifted him by the waist and

either "bounc[ed]," "pump[ed]," or shook his midsection up and down rapidly, three to five times. Louie described it as "like [Benny] was boning the bed." Chris characterized it as "the same motion that [I] saw the guys doing on the videotape with the women." Defendant commented, "[T]his is how it's going to feel when you're with a girl." He then did much the same thing to Chris.

Eventually, Benny went outside to mow the lawn; Chris and Louie went with him. Defendant gave Louie and Chris $10 to go and buy soda. When they got back, defendant told them (referring to the four boys who had remained behind), "[I] just got done sucking all their dicks."

When Louie and Chris left, defendant said he wanted them to come back at night to use his telescope. He also said he was out of candy and condoms and asked them to bring some.

Louie told his mother what had happened; she called the police.

The testimony of Benny, Chris, and Louie varied in a number of ways:

(1) According to Benny and Chris, all three boys went to defendant's house together. Louie testified, however, that he and Benny arrived before Chris.

(2) Louie claimed that Benny "ask[ed] to see a porno tape." According to Chris, Benny did ask to watch a video, but it was defendant who decided to play a pornographic video. Benny denied asking to watch a video at all.

(3) According to Louie, defendant straddled Chris before bouncing him. According to Chris, however, defendant stood off to his side. Benny did not remember defendant bouncing or even touching Chris.

(4) Only Chris recalled defendant saying, "[T]his is how it's going to feel when you're with a girl." Louie and Benny did not remember defendant saying anything during the bouncing.

(5) Louie and Chris estimated that they were all at defendant's house for an hour to an hour and a half. Benny thought they were there nearly four hours.

The police searched defendant's room while he was out. They found 28 nonpornographic videos, an adult magazine, an empty condom box, and some candy. Later that day, after defendant got home, Detective Brian Cervantez returned. He asked defendant to show him where he kept the pornographic videos. Defendant showed him a pornographic video that was on a dresser in a storage room, under a pair of pants. When Detective Cervantez asked defendant if he had shown that video to the boys, "[h]e initially said no. Then he changed his story and said he probably did."

Evidence that defendant had committed a prior sex offense was admitted, as we will discuss in part II, *post*.

In addition, certain expert testimony was admitted, as we will discuss in part III, *post*.

II

THE ADMISSION OF EVIDENCE OF

DEFENDANT'S PRIOR SEXUAL OFFENSE

Defendant contends the evidence of his prior sexual offense should have been excluded as more prejudicial than probative.

A. *Additional Factual and Procedural Background*.

At trial, Danny T. testified that in 1993, when he was 8 years old, he happened to be "hanging out" with defendant in defendant's bedroom.[1] Defendant began tickling him with a backscratcher, over his clothes. The tickling went "everywhere," including his groin. Defendant then orally copulated Danny. Danny testified, "[M]y eyes were closed, because it hurt really bad." Defendant stopped when someone else entered the room. In October 1997, defendant pleaded guilty to committing a lewd and lascivious act on Danny.

The prosecution had moved in limine for leave to introduce evidence of this prior sexual offense. Defense counsel objected. He conceded, "[R]emoteness is not an issue . . . , nor is consumption of time." He argued, however, that the prior was "inflammatory . . . ."

The trial court admitted the evidence. It ruled: " . . . I've weighed each of the factors, and under probability of confusion, remoteness, consumption of time, . . . all the

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[1] The fact that Danny was defendant's nephew was kept from the jury.

factors we're supposed to look at, it does come down to what the defense has stated, the inflammatory nature. [¶] But given the probative value, in the Court's mind, under 352, it clearly outweighs the prejudicial effect." It also ruled that, in addition to being admissible under Evidence Code section 1108, it was admissible under Evidence Code section 1101, subdivision (b), to show "intent and motive."

B. *Analysis*.

Under Evidence Code section 1108, evidence that the defendant has committed a prior sexual offense is admissible for any relevant purpose, including to show a propensity to commit the charged offense. (Evid. Code, § 1108, subd. (a); *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

To be admissible under this section, however, the evidence must also be admissible under Evidence Code section 352. (Evid. Code, § 1108, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 907, 916-922.) Thus, "trial judges must consider such factors as [the] nature, relevance, and possible remoteness [of the prior sexual offense], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Falsetta*, at p. 917.)

"[Evidence Code] section 1108 affects the practical operation of section 352 balancing '"because admission and consideration of evidence of other sexual offenses to show character or disposition [are] no longer treated as intrinsically prejudicial or impermissible. . . . As with other forms of relevant evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission."' [Citation.]" (*People v. Soto* (1998) 64 Cal.App.4th 966, 984, quoting Historical Note, 29B pt. 3, West's Ann. Evid. Code (1998 pocket supp.) foll. § 1108, p. 31.)

"The trial court enjoys broad discretion under . . . Evidence Code section 1108, subdivision (a). The exercise of this statutory discretion will not be disturbed on appeal '"except on a showing that the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." . . ."' (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42, fn. omitted, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, as identity was not disputed, the evidence was probative primarily as proof of intent. A propensity to molest boys was relevant to show that what defendant was doing on this occasion was, in fact, molesting boys. Moreover, the evidence was significantly probative of intent. Although defendant expressly likened the bouncing to sex, it was not, in itself, sex, or even foreplay. Defense counsel therefore argued at trial (as appellate counsel argues in this appeal; see part IV, *post*) that defendant did not act with the requisite intent of "arousing, appealing to, or gratifying" his sexual desires. The

evidence of the prior sexual offense demonstrated that defendant is sexually attracted to young boys. Also, as we will discuss, it tended to show that his otherwise ambiguous touching had an underlying sexual intent. It therefore tended to disprove any contention that defendant was just trying, in a misguided way, to give the boys a man-to-man education about heterosexual sex.

Defendant argues that the prior offense was not similar to the charged offense. The difference was that in the prior, defendant orally copulated the victim. But this was precisely what made the prior probative. "For this purpose, 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 320.)

Defendant also notes that the victim of the prior testified that the sex act "hurt really bad." This fact, however, was not brought to the trial court's attention in connection with the motion in limine. Accordingly, we can hardly say it abused its discretion by failing to consider it. Even if the trial court had considered it, it would not have had to exclude the prior as a whole; it could have simply excluded this detail. Defense counsel never objected specifically to the victim's testimony that the sex act hurt. Accordingly, defendant cannot complain that it, too, was admitted.

Next, defendant argues that the prior was remote. Again, this was not brought to the trial court's attention. In fact, defense counsel conceded that it was *not* remote; thus, he invited any error in failing to give this factor proper weight.

Defendant claims the prosecution misled his counsel by misrepresenting that the prior had been committed in 1997, rather than in 1993. At one point, the prosecution's trial brief did say that defendant had committed the prior in 1997 and been convicted in 1998. Earlier, however, the trial brief had disclosed that defendant committed the prior in 1993; the victim did not report it for two years; and defendant pleaded guilty in 1997. Thus, the supposed misrepresentation was self-evidently a typographical error. In any event, it was fairly inferable that, if defendant enjoyed orally copulating young boys in 1993, when he was 47, he still did in 2002, when he was 56. Thus, the prior was not so remote as to be unduly prejudicial.

Finally, defendant suggests the jury might have been tempted to punish him for the prior offense. It was stipulated, however, that defendant had pleaded guilty to the prior. This is generally regarded as minimizing the danger of such misplaced punishment. (See *People v. Scheid* (1997) 16 Cal.4th 1, 20; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

We conclude that the trial court did not err by admitting the evidence of defendant's prior sexual offense.

III

FAILURE TO OBJECT TO EXPERT TESTIMONY ABOUT "GROOMING"

Defendant contends his trial counsel rendered constitutionally ineffective assistance by failing to object to improper expert "profiling" testimony.

A. *Additional Factual and Procedural Background*.

Detective Cervantez, after reciting his qualifications as an expert on child molestation, testified:

"Q. And in the context of a child molest case, are you familiar with the term 'grooming'?

"A. Yes, sir.

"Q. Could you tell us what that means, or what that is?

"A. Grooming, as it relates to child molestation investigation, is when a -- the suspect will befriend the future victim. And usually this is a slow process. And how it begins is by the suspect gaining the trust of the victim, by talking to them nicely, giving the victim gifts, getting in a situation where the suspect and the victim are alone in a room or a house.

"And then, next thing occurring, is that the suspect starts to touch the victim to see how the victim's going to respond. Not in a sexual manner, just in the leg, just in the arm. Again, playing with the victim, start to tickle the victim. Just trying to -- again, gaining the trust of the victim. Telling the victim such things as, can you keep a secret, this is between me and you.

"And then, later on, maybe showing them some adult movies or magazines, or something of that nature.

"And what that suspect is doing is testing the waters to see how that victim, or the future victim, is going to respond to something, that in the future he's intending to have sexual relations with that victim."

Defense counsel did not object to this testimony.

B. *Analysis*.

"To prevail on a claim of ineffective assistance of counsel, a defendant '"must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."' [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible . . . . [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389, quoting *People v.*

Hart (1999) 20 Cal.4th 546, 623 and *Strickland v. Washington* (1984) 466 U.S. 668, 689 [104 S.Ct. 2052, 80 L.Ed.2d 674], respectively.)

"[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance. [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) Here, defense counsel has never had an opportunity to explain his failure to object, and this is not a case in which there could be no reasonable tactical explanation.

Even if the jurors had never heard the term "grooming" before, they did not need expert testimony to see defendant's conduct as incriminating. As soon as they heard that the neighborhood children called defendant "Candyman," they would have begun to think, "child molester." In addition, defendant was single, lived with his mother, let prepubescent boys hang out at his house, bought them pizza and soda, and showed them pornographic videos. As defendant even argues, "A jury certainly didn't need an expert to explain to them what was going on here . . . ."

On the other hand, in describing grooming, Detective Cervantez mentioned several things defendant did *not* do. There was no evidence that he had tried to get any of the boys alone. In addition, there was no evidence that he had asked any of them to keep any of the goings-on a secret. Thus, the expert testimony actually tended to disprove the conclusion the jury would otherwise have reached on its own.

Finally, the testimony also had some tendency to disprove intent. To the extent that defendant matched the profile, it suggested that he did not intend to obtain sexual

enjoyment from the bouncing itself; rather, he intended to see how the boys would react, in the hope of obtaining sexual enjoyment from them later. Indeed, defendant so argues in this appeal. (See part IV, *post*.) Accordingly, his defense counsel could have had a rational tactical purpose for letting the testimony come in.

For the same reasons, defendant has not shown prejudice. Even if defense counsel had objected -- and even if the trial court had sustained the objection -- we see no reasonable probability that defendant would have obtained a better verdict. We need not decide whether the trial court could, should, or would have sustained such an objection.

We conclude that defense counsel's failure to object was not ineffective assistance of counsel.

IV

THE SUFFICIENCY OF THE EVIDENCE OF INTENT

Defendant contends there was insufficient evidence that he acted with the requisite specific sexual intent.

A lewd and lascivious act on a child under 14 requires "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of th[e perpetrator] or the child . . . ." (Pen. Code, § 288, subd. (a).) Similarly, using pornography to seduce a minor requires "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of th[e perpetrator] or of a minor . . . ." (Penal Code § 288.2, subd. (a).)

Certainly defendant had sex on his mind. He showed the boys pornographic videos and photos. He concedes that, by bouncing them while commenting, "[T]his is

how it's going to feel when you're with a girl," he was "apparently . . . attempt[ing] to simulate sexual intercourse." He was at least thinking about orally copulating them, as shown by his boasts that he had already done so. He wanted them to come back at night and to bring condoms.

Defendant therefore argues that the touching itself did not afford him any sexual gratification. The statute, however, requires the intent of *either* (1) arousing, (2) appealing to, *or* (3) gratifying sexual desires. In some ways, arousal and gratification are mutually exclusive. The jury could reasonably find that defendant obtained sexual enjoyment from causing the boys to simulate intercourse. Inferably this fantasy aroused his sexual desires, or, at a minimum, appealed to them. There is no requirement that he intend to become *physically* aroused.

The evidence of the prior offense also tended to show the requisite intent. In that incident, defendant began by tickling Danny with a backscratcher. The tickling was not as obviously sexually tinged as the bouncing. Defendant used it, however, as a prelude to oral copulation. This was evidence that, when defendant begins touching boys, he intends to arouse himself.

Separately and alternatively, the jury could reasonably find that defendant intended to arouse *the boys'* sexual desires. By bouncing them, while showing them pornographic videos and commenting, "[T]his is how it's going to feel when you're with a girl," inferably he was inviting *them* to fantasize about sex.

Defendant argues that, because the victims had not yet reached puberty, they were unable to experience sexual arousal. This might be relevant if a prepubertal boy were the accused perpetrator. (See *In re Jerry M*. (1997) 59 Cal.App.4th 289, 300; but see *In re Randy S*. (1999) 76 Cal.App.4th 400, 407-409.) Here, however, prepubertal boys were the victims. ""It is not necessary to show that the sexual desires of the child . . . were actually affected, since the gist of the crime is the intent and not its accomplishment."" (*People v. Cordray* (1963) 221 Cal.App.2d 589, 593, quoting *People v. Piccionelli* (1959) 175 Cal.App.2d 391, 394, quoting 30 Cal.Jur.2d, § 12, p. 605.)

Defendant argues the bouncing was consistent with Detective Cervantez's expert testimony that grooming can include nonsexual touching, "to see how the victim's going to respond." The touching here, however, was hardly nonsexual. Even assuming that was one possible construction of the bouncing, it was not the only one, and the jury did not have to accept it. In any event, a pedophile might well get a charge out of touching a boy at all, even nonsexually, in preparation for seduction.

We conclude that there was ample evidence that defendant touched the victims with the intent necessary to violate Penal Code section 288.

V

SENTENCING ISSUES

A. *Additional Factual and Procedural Background*.

At sentencing, defense counsel stated: "I would simply just ask the Court to consider, given Mr. Lopez's age, that the Court consider striking the strike and perhaps

just sentencing him to 25 years to life rather than doubling . . . ." The trial court thanked defense counsel, then proceeded to sentence defendant as follows:

On count 5 (using pornography to seduce a minor), the principal term: the upper term of three years (Pen. Code, § 288.2, subd. (a)), doubled under the three strikes law, for a total of six years.

On count 1 (lewd and lascivious act on Benny): 25 years to life under the habitual offender law (Pen. Code, § 667.71, subd. (b)), doubled under the three strikes law (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (d)(1)), for a total of 50 years to life, to be served consecutively.

On count 2 (lewd and lascivious act on Chris): 50 years to life, on the same basis, stayed under Penal Code section 654.

On count 3 (child annoyance as to Benny): the upper term of six years (Pen. Code, § 647.6, subd. (c)(2)), doubled under the three strikes law, for a total of 12 years, but stayed under Penal Code section 654.

On count 4 (child annoyance as to Chris): a total of 12 years, on the same basis, also stayed under Penal Code section 654.

On the prior serious felony enhancement: five years, to be served consecutively. (Pen. Code, § 667, subd. (a).)

Accordingly, defendant's total sentence was 61 years to life in prison.

B. *Romero Motion*.

Defendant contends the trial court erred by denying his motion to strike his "strike" prior pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Romero held that a trial court has discretion to dismiss a strike prior under Penal Code section 1385. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) However, "[a] court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse." (*Id.* at p. 530.) Both the trial court and the appellate court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"A trial court's decision to strike prior felony convictions is subject to review under the 'deferential abuse of discretion standard. Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently

in the first instance. [Citation.]' [Citation.]" (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434, quoting *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Defendant's primary argument is that the trial court did not give him "'individualized consideration[].'" (See *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531, quoting *People v. Dent* (1995) 38 Cal.App.4th 1726, 1731.) The only evidence of this, however, is its failure to state, on the record, its reasons for denying the *Romero* motion. We are entitled to presume that the trial court understood the law and exercised its discretion; defendant has the burden of demonstrating otherwise. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 257; *People v. Fuhrman* (1997) 16 Cal.4th 930, 943-945; *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1433.)

Defense counsel relied exclusively on defendant's age. At the time of sentencing, defendant was 57 years old. Sometimes, a defendant's *young* age may militate in favor of striking a strike, on the theory that he or she should not have to pay for a youthful folly with the better part of his or her life. By that logic, older age militates *against* striking. An older defendant has less to lose; moreover, the commission of the current offense demonstrates that the older defendant has not "add[ed] maturity to age." (*People v. Williams*, *supra*, 17 Cal.4th at p. 163.) Certainly the trial court did not abuse its discretion by finding that defendant's age, standing alone, did not take him outside the spirit of the three strikes law.

On this record, we cannot say the trial court failed to consider any other factors that might have been relevant. If it did fail to consider them, defense counsel waived the

error. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) On the other hand, even if it did consider them, it could still properly deny the motion. Defendant points out that he committed the strike prior some 10 years earlier. According to the probation report, however, his family initially chose not to report the prior molestation; they did report it in 1997, however, because they "suspected" defendant had continued to molest the victim. Defendant committed the current offense even though he was still on probation for the prior and he had completed a sexual offender program. The three strikes law is aimed at precisely this kind of intractable recidivism.

Defendant also claims that he did not harm or threaten the victims (see Cal. Rules of Court, rule 4.423(a)(6)), and his prior record was "insignificant." (See Cal. Rules of Court, rule 4.423(b)(1).) He therefore argues the trial court erred by finding no mitigating circumstances. Ordinarily, such mitigating circumstances would be relevant solely to determinate sentencing, not indeterminate sentencing under the three strikes law. (And we note again that defense counsel waived the error for both purposes.) Defendant nevertheless argues that the trial court should have considered these mitigating circumstances in exercising its discretion under *Romero*. For the reasons already discussed, the trial court could reasonably find that defendant's criminal record was significant. Also, it found a number of aggravating factors, including vulnerable victims, planning and sophistication, and being on probation. It could reasonably give no weight to the mere fact that the victims were not physically harmed.

We conclude that the trial court did not abuse its discretion by denying defendant's *Romero* motion.

C. *"Full-Strength" Subordinate Terms*.

Defendant contends the trial court erred by imposing full upper-term sentences on counts 3 and 4, rather than one-third the midterm.

It is undisputed that, but for the fact that the terms on counts 3 and 4 were stayed, the trial court was required to impose one-third the midterm on each count. (Pen. Code, § 1170.1, subd. (a); *People v. Nguyen* (1999) 21 Cal.4th 197, 207.) The People, however, point out that the one-third-the-midterm limitation applies only when "a consecutive term of imprisonment is imposed . . . ." (§ 1170.1, subd. (a).) They argue that these terms were stayed pursuant to Penal Code section 654 and were not run consecutively. They conclude that the one-third-the-midterm limitation did not apply.

"Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) "[T]he trial court should *impose* a sentence on all counts. If section 654 prohibits the service of sentence on certain counts, the sentencing court must then stay *execution* of sentence on those counts. [Citations.]" (*People v. Watkins* (1994) 26 Cal.App.4th 19, 25, fn. 1 [Fourth Dist., Div. Two]; accord, *Deloza*, at p. 591-592; *People v. Pearson* (1986) 42 Cal.3d 351, 359-381.) Ordinarily, the stay is to become permanent once the defendant has served his or her sentence on the counts that triggered the operation of Penal Code section 654. (*People v. Pearson*, *supra*, 42 Cal.3d at p. 361.) The rationale

for imposing but then staying the sentence is that: "[I]f the defendant's conviction on the count for which the sentence is stayed is reversed on appeal, he or she can then be required to serve a sentence on a nonreversed count for which a stay of execution had been ordered. [Citation.]" (*Watkins*, at p. 25, fn. 1; see generally *People v. Niles* (1964) 227 Cal.App.2d 749, 756.)

This rationale tells us something about the nature of the sentence to be imposed. Here, the trial court implicitly determined that it could impose unstayed sentences on one -- and only one -- of counts 1, 2, 3 or 4. Accordingly, it stayed execution of sentence on counts 2, 3, and 4. The stay will become permanent upon defendant's service of his sentence on count 1. If count 1 and count 2 are both overturned, on appeal or in a state or federal habeas corpus proceeding, and if they cannot be (or are not) retried, the stay on counts 3 and 4 will dissolve automatically.

But if that happens, the sentences on counts 3, 4, and 5 cannot *all* be consecutive *as well as* the full-strength upper term; that would violate Penal Code section 1170.1, subdivision (a). From the fact that the trial court imposed the full-strength upper term on counts 3 and 4, we suspect it intended to make them concurrent. But concurrent to what? The problem is that once the stay dissolved, count 5 could no longer be the principal term. The longest term must be the principal term. (Pen. Code, § 1170.1, subd. (a).) Here, then, the trial court would have to select either count 3 or count 4 as the principal term; presumably it would stay the count not selected. Next, it would have to decide

whether to make count 5 concurrent or consecutive. Finally, if it chose to make count 5 consecutive, it would have to reduce it to one-third the midterm.

Provided the stay eventually becomes permanent, there is no problem. In the event, however, that the stay dissolves, the resulting sentence would be erroneous. Indeed, it is not even clear what the trial court intended that sentence to be.

But is this reversible error? We think not. In *People v. Watkins*, *supra*, 26 Cal.App.4th 19, the trial court failed to impose any sentence whatsoever on the stayed count. We held the error harmless; we explained that we were affirming the convictions on all counts, so the stayed sentence was moot. (*Id*. at p. 25, fn. 1; accord, *People v. Reed* (1969) 270 Cal.App.2d 37, 50; *People v. Jenkins* (1965) 231 Cal.App.2d 928, 934-935.)

Upon further consideration, we believe such an error is not, strictly speaking, moot. The unstayed counts could still be invalidated in a state or federal habeas corpus proceeding. In that event, however, as we will discuss in part V.D, *post*, the habeas court could allow the trial court an opportunity to resentence defendant on any previously stayed counts. Because the stayed sentence probably would never come into effect, it makes no sense to require the trial court to correct it now. Even more important, since the stayed sentence can still be corrected if and when necessary, any error affecting it is not prejudicial. (Cal. Const., art. VI, § 13; Pen. Code, § 1258.)

We conclude that, technically, the trial court erred by imposing full-strength upper-term sentences on counts 3 and 4 in addition to count 5. We further conclude, however, that this error is harmless and does not require reversal at this time.

D. *Failure to Strike the Multiple-Victim Special Circumstance Under the One Strike Law*.

Defendant contends the trial court erred by failing to dismiss or strike the true finding on the multiple-victim special circumstance. (Pen. Code, § 667.61, subd. (e)(5).)

In connection with counts 1 and 2, the information invoked two alternative sentencing schemes. First, for purposes of the habitual sexual offender law (Pen. Code, § 667.71), it alleged a qualifying prior sexual offense. (Pen. Code, § 667.71, subd. (c)(4).) Second, for purposes of the one strike law (Pen. Code, § 667.61), it alleged a multiple-victim special circumstance. (Pen. Code, § 667.61, subd. (e)(5).) Defendant admitted both allegations. The trial court opted to sentence defendant pursuant to the habitual sexual offender law rather than the one strike law.

Both the one strike law and the habitual sexual offender law are alternative sentencing schemes for specified sexual offenses, including -- as here -- nonforcible lewd conduct with a child under 14. (Pen. Code, §§ 667.61, subd. (c)(7), 667.71, subd. (c)(4).) The habitual sexual offender law provides for a sentence of 25 years to life when the defendant has previously been convicted of a specified sexual offense. The one strike law, by contrast, takes something of a Chinese menu approach. It contains two lists of special circumstances -- the more serious ones in subdivision (d), and the less serious ones in subdivision (e). One of the subdivision (e) special circumstances is the so-called multiple-victim special circumstance -- that "[t]he defendant has been convicted in the

present case or cases of committing a[specified sexual] offense . . . against more than one victim." (Pen. Code, § 667.61, subd. (e)(5).) The one strike law also provides that:

1. When only one subdivision (e) special circumstance is found true, the defendant "shall be punished" by 15 years to life in prison (Pen. Code, § 667.61, subd. (b));

2. When two or more subdivision (e) special circumstances are found true, the defendant "shall be punished" by 25 years to life in prison (Pen. Code, § 667.61, subd. (a)); and

3. When one or more subdivision (d) special circumstances are found true, the defendant "shall be punished" by 25 years to life in prison (Pen. Code, § 667.61, subd. (a)).

The one strike law then provides that: "If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in [this section] to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in [this section] rather than being used to impose the punishment authorized under any other law, *unless another law provides for a greater penalty*. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in [this section], and any other additional circumstance or circumstances shall

be used to impose any punishment or enhancement authorized under any other law." (Pen. Code, § 667.61, subd. (f), italics added.)

Last, but for our purposes, not least, the one strike law also provides: "Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e)." (Pen. Code, § 667.61, subd. (f).)

Striking the multiple-victim special circumstance would violate this express prohibition. (Cf. *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713 [enhancements under Pen. Code, § 12022.53, subds. (b) and (c) had to be stayed, rather than stricken, because Pen. Code, § 12022.53, subd. (h) prohibits striking them].) Even ignoring this reason for *not* striking it, we see no reason *for* striking it. The true finding under the one strike law and the true finding under the habitual sexual offender law could coexist peaceably.

The habitual sexual offender law provides that a defendant who meets its criteria "is punishable by imprisonment in the state prison for 25 years to life." (Pen. Code, § 667.71, subd. (b).) The one strike law, on the other hand, provides that when, as here, only one subdivision (e) special circumstance is found true, the defendant "shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years . . . ." (Pen. Code, § 667.61, subd. (b).) As construed by the Supreme Court, this "establishes a floor -- a minimum term a qualifying defendant must serve -- but does not require sentencing under the statute to the exclusion of any other sentencing provisions, or preclude imposing a total sentence that is greater than the term

of the One Strike law when other factors warrant greater punishment." (*People v. Acosta* (2002) 29 Cal.4th 105, 124.) Here, defendant *was* punished by imprisonment for life, and he *will not* be eligible for parole for 15 years -- and not for an additional 35 years thereafter.

Moreover, the one strike law specifies that, when only one subdivision (e) special circumstance is found true, "that circumstance or those circumstances *shall be used* as the basis for imposing the term provided in [this section] rather than being used to impose the punishment authorized under any other law, *unless another law provides for a greater penalty*." (Pen. Code, § 667.61, subd. (f), italics added; see also *People v. Acosta*, *supra*, 29 Cal.4th at p. 124.) In this case, the habitual sexual offender law *did* provide for a greater penalty. Thus, the trial court could and did sentence defendant pursuant to the habitual sexual offender law; the true finding under the one strike law did not require it to do otherwise. There is no reason to strike this finding.

Nevertheless, we are aware of two cases (albeit from the same appellate court) holding that, when both the one strike law and the habitual sexual offender law apply, the trial court must sentence under one and must strike the finding under the other.

The first was *People v. Johnson* (2002) 96 Cal.App.4th 188 [Fourth Dist., Div. One], disapproved on other grounds in *People v. Acosta*, *supra*, 29 Cal.4th at p. 134, fn. 13. There, the trial court imposed a sentence under the one strike law (which it doubled under the three strikes law). It also imposed a sentence under the habitual sexual offender law but stayed it, citing Penal Code section 654. (*Johnson*, at p. 193.)

The appellate court held that the one strike law and the habitual sexual offender law are mutually exclusive and that the trial court has discretion to choose which one to apply. (*People v. Johnson, supra,* 96 Cal.App.4th at pp. 204-207.) It also held, however, that the trial court erred by staying the sentence under the law not chosen, purportedly pursuant to Penal Code section 654. It explained that Penal Code section 654 does not apply to alternative sentencing schemes. (*Johnson,* at pp. 207-209.) Instead, analogizing to "certain recidivist enhancements," it held that the trial court was required to strike the unused "alternative penalty . . . ." (*Id*. at pp. 208-209, citing *People v. Jones* (1993) 5 Cal.4th 1142, 1147-1152.) In a footnote, the court added: "Although it has been determined that a trial court has no authority to strike any of the circumstances specified in subdivision (d) of section 667.61 once they have been pled and proved [citations], nothing in section 667.61 precludes a court from striking the punishment for those circumstances where the defendant is sentenced under an alternative sentencing scheme." (*Johnson*, at p. 209, fn. 13.)

Much of the analysis in *Johnson* turned on certain statutory language that was in effect when the charged crimes were committed but which -- as the court noted -- had been deleted in 1998. (*People v. Johnson*, *supra*, 96 Cal.App.4th at pp. 204-206.) In *People v. Snow*, *supra*, 105 Cal.App.4th 271, the court held that *Johnson* remained good law even after the amendment. (*Snow*, at pp. 281-282.) Thus, the court reiterated that "the one strike law and the habitual sexual offender law continue to be alternative sentencing schemes: a sentence may be imposed under one of the sentencing schemes,

but not both, and the decision to choose which sentencing scheme to impose is within the reasonable discretion of the sentencing court." (*Id*. at p. 282.) It also reiterated that: "[S]ection 654 does not apply to alternative sentencing schemes. [Citations.]" (*Id*. at p. 283.)

Citing *Johnson*, the court in *Snow* concluded that when "the alternative sentencing schemes of section[s] 667.61 and 667.71 apply, the sentencing court has discretion to choose one of the sentencing schemes and then must strike or dismiss, rather than stay, the sentence under the other. [Citation.]" (*People v. Snow, supra,* 105 Cal.App.4th at p. 283.) The court therefore "vacate[d] the habitual sex offender true finding." (*Id*. at p. 284.)

To sum up, in holding that the unused sentencing finding must be stricken or dismissed, *Snow* relied on *Johnson*; *Johnson*, in turn, relied on *People v. Jones*, *supra*, 5 Cal.4th 1142.[2]

In *Jones*, the trial court had imposed both a five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)) and a one-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)), based on the same prior conviction. (*People v. Jones, supra,* 5 Cal.4th at p. 1145.) The Supreme Court held this improper. It relied on the provision of Penal Code section 667 that stated: " . . . 'This section shall not be applied

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[2] Actually, *Johnson* relied on both *Jones* and *People v. Flournoy* (1994) 26 Cal.App.4th 1695. (*People v. Johnson*, *supra*, 96 Cal.App.4th at p. 209.) *Flournoy*, however, merely cited and followed *Jones*. Thus, it did not add anything to the analysis.

when the punishment imposed under other provisions of law would result in a longer term of imprisonment. . . .'" (*Jones*, at p. 1149, quoting former Pen. Code, § 667, subd. (b); see now Pen. Code, § 667, subd. (a)(2).) It construed this to mean "that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Jones*, at p. 1150.) The court therefore remanded "with directions to strike the one-year enhancement . . . under subdivision (b) of section 667.5 . . . ." (*Id*. at p. 1153.)

Jones, however, did not actually discuss whether striking the unused enhancement finding was the appropriate remedy. As the Supreme Court has often reminded us, "cases are not authority for propositions not considered. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176, and cases cited.) Moreover, it is not at all clear whether the court intended to strike the enhancement *finding* or the *punishment* for the enhancement. Since the trial court had sentenced the defendant to a separate and consecutive term for each enhancement, certainly the court had to do *something* to eliminate the excess punishment. Thus, *Jones* is not authority for the proposition that an unused enhancement *finding* must be stricken.

The correct procedure would have been to impose a sentence on the barred enhancement, but then stay execution of that sentence. California Rules of Court, rule 4.447 (rule 4.447) provides that: "No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge shall

impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed." This rule is intended "to avoid violating a statutory prohibition or exceeding a statutory limitation, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence. [Citation.]" (Advisory Com. com., 23 pt. 2 West's Ann. Codes, Rules (2004 supp.) foll. rule 4.447, p. 143.)

It is important to distinguish between two possible reasons for staying the sentence on an enhancement. Ordinarily, an enhancement must be either imposed or stricken "in furtherance of justice" under Penal Code section 1385. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391; *People v. Irvin* (1991) 230 Cal.App.3d 180, 191-192.) The trial court has no authority to stay an enhancement, rather than strike it -- not, at least, when the only basis for doing either is its own discretionary sense of justice. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 152; *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1121-1124.)

But rule 4.447 has nothing to do with a *discretionary* stay of an enhancement. It is limited to the situation in which an enhancement that *otherwise* would have to be either imposed or stricken is barred by an overriding statutory prohibition. In that situation -- and that situation only -- the trial court can and should stay the enhancement. (E.g., *People v. Campbell* (1995) 40 Cal.App.4th 1666, 1674, fn. 7, disapproved on other

grounds in *People v. Ledesma* (1997) 16 Cal.4th 90, 101, fn. 5; *People v. Johnson* (1986) 188 Cal.App.3d 182, 190-191; *People v. Whigam* (1984) 158 Cal.App.3d 1161, 1169, disapproved on other grounds in *People v. Poole* (1985) 168 Cal.App.3d 516, 524, fn. 7.)

A stay under rule 4.447 is not issued under Penal Code section 654. Nevertheless, it is analogous. In both situations, the stay has no express statutory basis. It is implied, so that a defendant who is subject to one of two alternative punishments will not be wrongly subjected to the other; if, however, one of the two punishments is invalidated, the defendant will still be subject to the remaining one. By contrast, *Johnson* and *Snow*, by holding that the unused finding must be stricken, do not deal with the unacceptable risk that the used finding may be invalidated.We do understand that, even if the unused finding is stricken, it may later be "revived by operation of law." (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 712, fn. 5.) For example, if for some reason we invalidated the actual sentence in this appeal, we could impose the correct alternative sentence ourselves; or, we could just remand for resentencing. Similarly, if the actual sentence is invalidated in a state or federal habeas corpus proceeding, the habeas court could give the trial court an opportunity to impose the correct alternative sentence. (See *North Carolina v. Pearce* (1969) 395 U.S. 711, 714 [89 S.Ct. 2072, 23 L.Ed.2d 656]; Pen. Code, § 1484; *People v. Barocio* (1989) 216 Cal.App.3d 99, 111-112.)

Despite this, our Supreme Court has repeatedly indicated that -- at least in the context of Penal Code section 654 -- it is the possibility that the actual sentence may be invalidated that requires the trial court to stay, rather than dismiss, the prohibited portion

of the sentence. (*People v. Pearson* (1986) 42 Cal.3d 351, 360; *In re Wright* (1967) 65 Cal.2d 650, 655 and 655, fn. 4, citing *People v. Niles*, *supra*, 227 Cal.App.2d at pp. 755-756.) The Judicial Council relied on the same reasoning in adopting rule 4.447. We believe that is because a stay makes the trial court's intention clear -- it is staying part of the sentence only because it thinks it must. If, on the other hand, the trial court were to strike or dismiss the prohibited portion of the sentence, it might be misunderstood as exercising its discretionary power under Penal Code section 1385. There is something to be said for clarity, particularly when there is always the possibility that the actual sentence may be struck down many years after the fact, by a different state or federal judge. There is also something to be said for having one clear rule for the trial court to follow whenever part of a sentence is barred.

In sum, we do agree with the *Johnson*/*Snow* court that two alternative sentencing schemes, such as the one strike law and the habitual sexual offender law, are analogous to two alternative enhancements, such as in *Jones*. We do not agree, however, that *Jones* is authority for striking the unused alternative. And even if it were, we see no way around the unequivocal command that "the court shall not strike" any special circumstance finding under the one strike law. (Pen. Code, § 667.61, subd. (f).)

Here, the trial court properly chose to proceed under the habitual sexual offender law. We therefore need not decide whether it could have proceeded under the one strike law instead, nor what, in that event, it would have had to do with the unused finding under the habitual sexual offender law.

The trial court also properly allowed the unused finding under the one strike law to stand; it was not inconsistent with the sentence, so there was no need to strike, dismiss, or stay it.

Finally, we believe the trial court could have imposed a "fallback" sentence under the one strike law, then stayed it, with the stay to become permanent upon defendant's service of his actual sentence under the habitual sexual offender law. Although it did not have to do so, it did do the most important thing -- it let the one strike law finding stand, and it thereby preserved the possibility of resentencing defendant, if necessary, under the one strike law.

We therefore decline to strike or dismiss the multiple-victim special circumstance finding under the one strike law.

E. *Errors in the Abstract of Judgment*.

Defendant contends the abstract of judgment is erroneous in two respects.

First, the abstract of judgment mistakenly recites that defendant was sentenced pursuant to the one strike law, Penal Code section 667.61. (The sentencing minute order also contains the same mistaken recital.) Actually, as we have discussed, he was sentenced pursuant to the habitual sexual offender law, Penal Code section 667.71.

Second, the abstract of judgment mistakenly indicates that the sentence on count 2 was not stayed. Actually, the trial court stayed it under Penal Code section 654.

We will direct the trial court to make the necessary corrections.

VI

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the sentencing minute order and the abstract of judgment as indicated in part V.E of this opinion and to forward a certified copy of the amended abstract to the Department of Corrections. (Pen. Code, §§ 1213, 1216.)

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P.J.

WARD
J.